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In the Supreme Court

of the United States

OCTOBER TERM, 1949

No. 537

R. W. POINTER, doing business under the fictitious name and style of Pointer-Willamette Co.,
Petitioner,

vs.

SIX WHEEL CORPORATION, a corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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No.....

R. W. POINTER, doing business under the fictitious name and style of Pointer-Willamette Co.,
Petitioner,

vs.

SIX WHEEL CORPORATION, a corporation,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, R. W. Pointer, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered

in the above entitled cause on September 27, 1949 (R. 583), reported at 177 F. (2d) 153, affirming the judgment (R. 25-29) of the United States District Court for the District of Oregon.

Summary and Short Statement of Matter Involved

This is a patent infringement suit brought by the respondent as the plaintiff against petitioner as the defendant, in the United States District Court for the District of Oregon, alleging infringement by the defendant of United States Letters Patent No. 1,926,727 (Plaintiff's Exhibit No. 1, R. 295), issued September 12, 1933, to plaintiff, as assignee, on an application filed January 3, 1927, by Garner L. Knox. The patent is for "Six Wheel Attachment for Motor Vehicles" and is concerned with the problem of providing for motor vehicles, such as trucks and busses, a suspension employing an added axle to distribute the load to a greater number of wheels. Such devices are used extensively in heavy duty motor vehicles in order to protect the roadbed by reducing the weight transmitted by each wheel to the road surface.

Petitioner's alleged infringing structure is a tandem axle vehicle suspension designed principally for use on trailers. It is exemplified by plaintiff's Exhibit 3-A (R. 310A) and by the model of the defendant's structure, defendant's Exhibit 69. It is known to the trade, and is usually referred to herein, by the trade mark name "Feather Ride".

Petitioner's structure comprises, at each side of the vehicle, front and rear beams interconnected by a shackle. The front and rear axles of the Feather Ride suspension are mounted in rubber bushings carried by the front and rear beams, respectively.

The District Court found "that the prior art relied upon by the defendant does not disclose any instance of prior knowledge or invention of the combination disclosed in the Knox patent in suit, nor any solution of the problem in this art first solved by Garner L. Knox" (R. 22). Also, "That the prior patents relied upon by the defendant to anticipate or limit the claims of the Letters Patent in suit are * * * either impractical or inoperative, and do not teach a solution of the problem first successfully solved by Garner L. Knox" (R. 23).

The District Court adjudged that claims 1, 2, 11, 15 and 17 of the Knox patent in suit are good and valid in law, and that manufacture and sale of the Feather Ride suspension is an infringement thereof (R. 26).

The District Court rendered judgment June 14, 1948 (R. 25-29) for the plaintiff. Defendant duly appealed to the Court of Appeals for the Ninth Circuit, and that court affirmed the judgment of the District Court by opinion (R. 560-582) filed September 27, 1949, and entered judgment (R. 583), holding for the plaintiff on the issues of invention and infringement, but making no specific ruling on validity of the claims. Petitioner filed his petition for rehearing before the Court of Appeals for the Ninth Circuit, which petition was denied November 3, 1949 (R. 584).

Jurisdiction

The judgment of the Court of Appeals for the Ninth Circuit was entered September 27, 1949 (R. 582-583). Petitioner, who was the appellant below, filed his petition for rehearing October 27, 1949, within the time allowed therefor by Rule 25 of the Court of Appeals. The petition was denied by order of the Court entered November 3, 1949 (R. 584). Thereafter, and within ninety days thereof, as provided to be done in Title 28, United States Code, Section 2101, paragraph (c), in applications for appellate review by writ of certiorari, petitioner filed his petition for writ of certiorari in this Honorable Court as provided by Rule 38. Jurisdiction of this Court rests upon Section 1254 (1) of Title 28 of the United States Code. Reasons for the exercise of the discretionary jurisdiction of the Honorable Supreme Court in certiorari are set forth in the petition under the section entitled "Reasons for Allowance of the Writ".

Questions Presented

Your petitioner respectfully represents that the decisions of the lower courts raise the following questions:

1. Whether, as in the instant case, notwithstanding a District Court and Court of Appeals held the plaintiff's *invention* patentable over the prior art, the claims of the patent in suit are nevertheless invalid if they are drawn in language so broad as to read on structures disclosed by the prior art?

2. Whether claims, valid if construed to define the structure shown by the drawings and specification of the patent in suit, are rendered functional and lack compliance with the statutory requirement of particularity and distinctness when construed so broadly as to fail to distinguish from what went before in the art?

3. Whether it is necessary that a defendant in a patent infringement suit introduce evidence that structures disclosed by prior art relied upon to show invalidity of the claims have been constructed and proven to be practical, operable devices in an analogous art?

4. Whether, in a patent infringement suit, defendant who approximates a prior art structure can be held to infringe the patent in suit by reason of the court's finding that the said prior art structure resides in a non-analogous art?

Reasons Relied Upon for Allowance of the Writ

Your petitioner respectfully prays that the Writ be allowed for the following reasons:

1. Question 1 presents as a question of law a test for patent validity which is well known in the soliciting of patents in the United States Patent Office, and known unofficially to patent attorneys by practice and precept but which it appears the Supreme Court has never been called upon to enunciate in the form of case law, and which it is believed should be settled by official pronouncement. Failure of the courts below to apply this test has led the courts into error on other rules of patent

law, resulted in the miscarriage of justice in this case, and sanctioned a monopoly by patent of a breadth such as to dominate the prior art as well as all present and future structures which achieve results the same as those obtained by the Knox patented structure. It is believed that other courts may be led into error in the same manner if the decision of the Court of Appeals is allowed to stand.

2. The Court of Appeals has by an unwarranted extension of the doctrine of equivalents obtained a result in law which is inconsistent with the requirements of RS 4888 (Act of March 3, 1915, Ch. 94, Sec. 1, as amended; 35 U.S.C. 33) and contrary to the decision of the Supreme Court in the cases of *Halliburton Oil Well Cementing Co. v. Walker* (1946), 329 U.S. 1, 67 S. Ct. 6, 71 U.S.P.Q. 75; *General Electric Co. v. Wabash Co.* (1938) 304 U.S. 364, 37 U.S.P.Q. 466; and *United Carbon Co. v. Binney & Smith* (1942), 317 U.S. 228, 63 S. Ct. 165, 55 U.S.P.Q. 381, all of which decry the functional claim.

3. Question 3 was determined in the affirmative by the Court of Appeals in a way probably in conflict with applicable decisions of the United States Supreme Court in the following cases: *Pickering v. McCullough* (1881), 104 U.S. 310; *Dashiell v. Grosvenor* (1895), 162 U.S. 425; *Cohn v. U. S. Corset Co.* (1876), 93 U.S. 366; *Smith v. Hall* (1937), 301 U.S. 216; and *Electric Storage Battery Co. v. Shimadzu* (1939), 307 U.S. 5.

4. Question 4 was determined in the affirmative by the Court of Appeals for the Ninth Circuit in a way probably in conflict with an applicable decision of the

United States Supreme Court in the case of *Dashiell v. Grosvenor,* supra.

Prayer

WHEREFORE, Your Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Court of Appeals for the Ninth Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record of proceedings herein; and that the judgment of the Court of Appeals for the Ninth Circuit be reversed by this Honorable Court, and that your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

R. W. POINTER, Petitioner,
by HAROLD L. COOK,
LEE R. SCHERMERHORN,
Counsel for Petitioner.

CERTIFICATE OF COUNSEL

Harold L. Cook does hereby certify that he is one of the attorneys for R. W. Pointer, the petitioner named in the foregoing Petition for Writ of Certiorari, that the petition is well founded in law and in fact, and is not interposed for delay.

HAROLD L. COOK,
Of Counsel for Petitioner.

In the Supreme Court

of the United States

OCTOBER TERM, 1949

No.....

R. W. POINTER, doing business under the fictitious name and style of Pointer-Willamette Co.,
Petitioner,

vs.

SIX WHEEL CORPORATION, a corporation,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER
In Support of Petition for Writ of Certiorari

This petition is brought to review a decision of the Court of Appeals for the Ninth Circuit in a patent infringement suit. The decision, written by District Judge Yankwich, and reported in 177 F. (2d) 153 (R. 560-582), affirmed the judgment of the U. S. District Court

for the District of Oregon (R. 25-29) holding the patent valid and infringed.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered September 27, 1949 (R. 582-583). Petitioner, who was the appellant below, filed his petition for rehearing October 27, 1949, within the time allowed therefor by Rule 25 of the Court of Appeals. The petition was denied by order of the Court entered November 3, 1949 (R. 584). Thereafter, and within ninety days thereof, as provided to be done in Title 28, United States Code, Section 2101, paragraph (c), in applications for appellate review by writ of certiorari, petitioner filed his petition for writ of certiorari in this Honorable Court as provided by Rule 38. Jurisdiction of this Court rests upon Section 1254 (1) of Title 28 of the United States Code.

STATEMENT OF THE CASE

In 1925 Garner L. Knox was chief engineer of Utility Trailer Manufacturing Company. In January of that year, one Harry Y. Stebbins brought to that company a form of six wheel attachment. About thirty such devices were built for him on a time and material basis (R. 71). The Stebbins attachment was substantially what is shown in Fig. 1 of the Knox patent in suit, Letters Patent No. 1,926,727, "if you omit the universal

on the end of the rocker arm and just make a [pin and bushing] connection there" (R. 75). Mr. Knox believed that a universal joint was required where the rocker arm attached to the axle (R. 71).

An agreement was executed May 21, 1925, whereby Utility Trailer Manufacturing Company purchased from Mr. Stebbins the business of manufacturing and selling the Stebbins attachment (R. 123), whereupon Mr. Knox immediately designed the necessary parts to get universal action in the end of the rocker arm (R. 89).

Mr. Stebbins filed application for Letters Patent, Serial No. 26,884, on April 30, 1925, for the structure which is shown in Fig. 1 of the Knox patent in suit, except that he employed a pin and bushing in place of the universal joint disclosed by Knox (R. 117). This application was involved in interference No. 55,455 with an application filed February 18, 1925, by David L. Van Leuven, Serial No. 9939. Mr. Stebbins and his assignee, Utility Trailer Mfg. Co., conceded priority of invention to David L. Van Leuven (R. 43). The Van Leuven application matured as Letters Patent No. 1,655,481. The Van Leuven patent was owned by Respondent, Six Wheel Corporation, which is a patent holding corporation owned by Utility Trailer Manufacturing Company (R. 121).

Petitioner's Alleged Infringing Device

The petitioner's structure (R. 310A) is a dual-beam, dual-axle suspension comprising interconnected front and rear walking beams, each carrying an axle for the

road wheels of the vehicle. The front beam is pivotally connected at its forward end to the vehicle frame, and is pivotally connected at its rear end to the forward end of the rear beam. The rear beam supports a major proportion of the weight of the vehicle on a trunnion intermediate the ends of the rear beam, with the rear axle attached near the rearward extremity of the beam. A resilient assembly comprising nested coil springs is arranged to support the vehicle frame on the rear beam trunnion. The various pivotal connections of the two beams and the connections between the beams and the axles are all rubber cushion mounted in a manner to provide an inherent resilience and flexibility in the system and to obviate the necessity for lubrication of any part of the system. Mr. Knox testified that the use of rubber was a common manner of providing flexible action (R. 96). Pursuant to Mr. Knox's testimony in this regard, it is petitioner's position that:

1. The use of springs or beams connected at one end to the vehicle frame and connected at their opposite ends to rocker arms for distributing the load to tandem axles, one such axle being mounted midway of the length of the beam or spring and the other such axle being connected to the end of the rocker arm, was known and invented prior to the date of invention by Mr. Knox of the alleged invention defined by the claims in suit, stipulated to be March 1, 1925. This use of springs or beams and rocker arms for distributing the load to tandem axles is clearly shown by the device which Mr. H. Y. Stebbins brought to Mr. Knox in January, 1925; by Letters Patent No. 878,156 (R. 480); by Letters Patent

No. 1,534,458 (R. 539); Letters Patent No. 1,655,481 (R. 547); British Patent No. 8262 of 1906 (R. 564).

2. The use of a universal joint as a means for attaching an axle to the free ends of rocker arms was known and invented prior to the date of invention by Mr. Knox of the alleged invention defined by the claims in suit, stipulated to be March 1, 1925. This use of a universal joint is clearly shown by Letters Patent No. 878,156 (R. 480); No. 1,111,924 (R. 497); No. 1,131,118 (R. 503); No. 1,316,369 (R. 520); No. 1,527,987 (R. 533); and No. 1,692,891 (R. 555).

Although the Court of Appeals for the Ninth Circuit discussed the preliminary questions of inventorship and invention, it did not make any determination of the validity of the claims of the patent in suit; it did not apply the Knox claims in suit to petitioner's structure to support a holding of infringement; and it did not dispose of petitioner's contention of justification by reason of prior art.

SPECIFICATION OF ERRORS

1. The Court of Appeals erred in failing to find that claims 1, 2, 11, 15 and 17 of the Knox patent in suit are invalid in view of prior art cited by petitioner.

2. The Court of Appeals erred in failing to find that claims 1, 2, 11, 15 and 17, construed so as to read upon petitioner's alleged infringing device, are invalid for the reason that, construed in the same manner, they read upon the prior art, for example, Letters Patent to Jef-

fries 174,533; Pratt 878,156; Naeser 1,414,147; Van Leuven 1,655,481; and British Patent No. 8262 to Spencer.

3. The Court of Appeals erred in its application of the doctrine of equivalents to find infringement based upon identity of function, and in its conclusion that identity of structure results from identity of function, without applying the doctrine of equivalents in the same way to compare Feather Ride with the prior art, such as the patents to Pratt 878,156; Stebbins et al, 1,562,265; Van Leuven 1,655,481; Naeser 1,414,147; and British patent to Spencer 8262/1906.

4. The Court of Appeals mistakenly considered the prior art to be "paper" art and erred in its failure to accord due weight to the prior art in the belief that if it were impractical or inoperative or non-analogous it was not competent.

5. The Court of Appeals erred in failing to find that petitioner's activities fall within the scope of the prior art patents No. 878,156 to Pratt; No. 1,534,458 to Mohl; British Patent No. 8262 to Spencer; and No. 1,655,481 to Van Leuven.

ARGUMENT

Summary of Argument

The argument is summarized in the Petition, in the Reasons Relied Upon for Allowance of the Writ, page 5.

I. The claims of the patent in suit are invalid if drawn in language so broad as to read on structures disclosed by the prior art.

The lower courts have fallen into error, both in their decisions on the merits, and in the application of principles of patent law, by their failure to recognize that prior art patents relied upon by a defendant in a patent infringement suit may be used either (1) to show anticipation of the invention or (2) to test the validity of the claims, or both. The District Court and the Court of Appeals found that the Knox *invention* was not anticipated by the prior art cited by petitioner, which petitioner concedes is a permissible finding, but they have not considered at any time the second function of the prior art patents, namely, to test the validity of the claims of the Knox patent. The District Court, in Findings of Fact 7 and 8 (R. 19-20), described the invention *disclosed in the drawings* of the Knox patent in suit, and found that this invention was novel and useful and not anticipated by anything existing in the prior art. The Court of Appeals referred (R. 571) only to Findings 7 and 8 (R. 19-20). The Court of Appeals acclaimed the advantages of the invention, but at no time made any reference to the *invention as defined by the claims* of the Knox patent, which petitioner submits is a substantially different matter from the *invention* considered in the abstract.

Even though the Court of Appeals has found in the instant case that the Knox patent involves invention,

such opinion is not conclusive on the issue of validity. Even though it be conceded that Knox made an invention, the claims must nevertheless correctly define that invention in order for the patent to be valid. The claims measure the patent grant. *Graver Tank & Mfg. Co., Inc. v. Linde Air Products Co.* (1949), 336 U.S. 271, 277; 80 U.S.P.Q. 451, 453, and cases cited therein. In *United Carbon Company v. Binney & Smith* (1942), 317 U.S. 228, 237; 63 S. Ct. 165; 55 U.S.P.Q. 381, 386, Mr. Justice Jackson, in delivering the opinion of the court, stated: "An invention must be capable of accurate definition, and it must be accurately defined to be patentable." Petitioner submits that a proper corollary to the statement of Mr. Justice Jackson is that if the claims are drawn so broadly that they read on the prior art, they are invalid and the patent is unenforceable even though it disclose meritorious invention. In such a case, the patent may be saved only by restricting the interpretation of the terms of the claims to the disclosure of the drawings and specification, as indicated by the cases cited, post. If Knox made any contribution to the art, he failed to define it, either deliberately or inadvertently, in terms which avoid the prior art, and his patent reads on the prior art and dominates all structures resembling the prior art.

A. Decisions Supporting the Proposition.

Petitioner has been unable to find any decision of the Supreme Court, or of any lower court, directly holding that claims are invalid which read upon the prior art: Petitioner believes it would be salutary to the

judicial administration of patent law by the lower courts for this Honorable Court to expressly approve the use of prior art in this manner. Such a proposition ought to be a companion principle of law to that enunciated by the Supreme Court in *Halliburton Oil Well Cementing Co. v. Walker* (1946), 329 U.S. 1.

Strength for the proposition can be gained from the following few cases:

In *Peters v. Active Manufacturing Co.* (1888), 129 U.S. 530, 537, where the Supreme Court quoted with approval from the decision of the Circuit Court dismissing the bill, as follows:

> " * * * the claim is so broad as to cover any sheath, of any material, shape, or size, for applying moldings to any article. There is nothing more in the sheath patented to the complainant than an adaptation of the sheath used at Binghampton [prior art] to the application of moldings to carriage dash-boards—an adaptation which would have occurred to a skilled mechanic without the exercise of the inventive faculty. Had the complainant's invention been first in time and patented, the Binghampton sheath would have been an infringement, and conversely, had the Binghampton sheath been patented, the complainant's would have been an infringement. That which infringes, if later, would anticipate, if earlier."

The statement "That which infringes, if later, would anticipate, if earlier" was again quoted by the Supreme Court in *Knapp v. Morss* (1893), 150 U.S. 221, 228, and has since become a maxim in patent law. From this it can be reasoned, as illustrated in the preceding case, that since the claims must read on the infringing device

to constitute infringement, if they likewise read on a device which is earlier, they are anticipated.

In *Westinghouse v. Formica* (1924), 266 U.S. 342, 354, the assignee of the patent contended for a construction of the claims commensurate to a claim which had been originally presented, and which was broader than the issued claims, on the ground that it was supported by the specification and claimed that it was not estopped by the cancellation of the claim by the assignor. The Supreme Court, in rejecting the contention, quoted the original claim and then stated:

> "This was promptly rejected by the Patent Office as it must have been in the then state of the art. It was so absurdly broad and all inclusive as almost to indicate that it was made to be rejected."

B. Decisions Indicating the Law, but Construing the Patents Narrowly to Save Them.

While there are many decisions which seem to indicate that such is or should be the law, the cases where the question has been involved have usually been decided on the ground that the claims will be construed narrowly to avoid the prior art, thereby saving the validity of the patent but resulting in non-infringement.

The following cases are cited as typical or exemplary of the manner the courts have treated cases where invention was found to be present, and the claims were capable of a construction broad enough to read on the prior art:

In *Washing Machine Co. v. Tool Co.* (1873), 20 Wall, (87 U.S.) 342, 350, it was stated:

> "It need hardly be said that the claims are to be construed with reference to the state of the art at the time when the alleged invention was made."

In *Gates Iron Works v. Fraser* (1893), 153 U.S. 332, 347, it was stated:

> "A comparison of the Brown patent, in the particulars relied on, with the prior Putter and Tripp patents, satisfies us that, even if some of his additional devices were deemed novel, it is plain from the history of such machines, that his claims to be saved, must receive a very narrow construction. Thus limited, they are not infringed in defendants' machines."

This is tantamount to saying that the claims would be invalid if given a construction which permitted them to read on the prior art.

In *Dashiell v. Grosvenor* (1895), 162 U.S. 425, 432, it was stated:

> "As several of the patents above described show that, at the date of the Seabury invention, it was no longer a novelty to perform the three movements necessary to open and close the breach by the continuous movement of a single lever, it follows that the first claim of this patent cannot receive the broad construction claimed, but must be limited to the precise mechanism described."

In *Lektophone Corp. v. Rola Co.* (1930), 282 U.S. 168, 171, it was stated:

> "All of these elements in combination went to make up the novelty of his alleged invention. To the size, shape and proportion thus disclosed the patentee is limited by the prior art and the very essence of his invention. If the patent was valid it must be confined narrowly to the combination described."

In *Barber Colman Co. v. Withnell* (D.C. Mass., 1926), 14 F. (2d) 780, 783, District Judge Morton, when confronted with a substantially similar situation as in the present case, stated:

> "Certain of its claims [the patent in suit], if broadly construed, can be read on the defendant's machine; but, if given the same breadth, they read on machines of the prior art. The plaintiff cannot have it both ways—narrow for the prior art and broad for the defendant."

The decree was affirmed by the Court of Appeals for the First Circuit (1927), 20 F. (2d) 373.

In *Roberts Numbering Machine Co. v. Wetter Numbering Machine Co.* (C.A. 2, 1931), 54 F. (2d) 461, 461-462, Circuit Judge Learned Hand stated:

> "In determining the scope of claims the relevant comparison is between the prior art and the supposed infringement, not the disclosure. The claims speak in general terms and thus make the disclosure only an instance or example of its more or less abstract aspects. In some sense all claims are necessarily functional, and indeed the chief problem for courts is how far generalization is permissible. The prior art is a limit in any case beyond which they cannot go; their language is another, dependent first upon its proper interpretation, and next upon the latitude allowed under the doctrine of equivalents. Thus a reference may be relevant on the score of infringement which is immaterial to validity, as is well understood. Moreover, if the patentee must extend his claims to cover functions disclosed in his specification in order to include the supposed infringement, *prior art is a sufficient answer which discloses that same function,* though the references be different in detail from the infringment, for they are as good to anticipate, as the patented disclosure

> is to extend the monopoly. The patentee, being obliged to resort to functional similarities between his disclosure and the infringement, must be content to accept the same measure as to the prior art." (Emphasis supplied)

The court held the patent valid but not infringed.

In *Bragg-Kliesrath Corporation v. Walter S. Vogel & Co.* (C.A. 2, 1933), 67 F. (2d) 531, 532, where a patent was held valid but not infringed, Circuit Judge Learned Hand, delivering the opinion of the court, stated:

> "But it is another matter how far the claims, which verbally cover the defendant's apparatus, will bear such an extension beyond the device disclosed. Patent claims are peculiar in that in a proper case courts will save them by limiting their expressed intent to so much of the field as the prior art leaves open; this is the converse of the doctrine of equivalents. Their intent is at once compressible and expansible, and courts go far to save them; so far, indeed, as to make them an anomoly among written instruments."

To the same effect is *Hookless Fastener Co. v. G. E. Prentice Mfg. Co.*, decided by the Second Circuit Court of Appeals (1934) 68 F. (2d) 848.

It is a familiar rule of law that the claims must be construed in the light of the prior art and the patent specification. See Walker on Patents (Deller's Edition) Volume 2, Sections 259, 260 and 261, pp. 1238-1242.

It will be noted, however, that each of the above cases, and rules of law cited, fall short of saying that claims are invalid which read on the prior art, although it is believed that is a fair inference.

C. Prior Art Patents Are Entitled to the Same Liberality and Inclusiveness of Construction as Accorded the Patent in Suit.

The error of the Courts below with respect to the question under consideration is believed to be due to the fact that they did not accord the prior art patents the same liberality and inclusiveness as they accorded the patent in suit, contrary to the rule laid down in the case of *United Carbon Company vs. Binney & Smith Co.* (1942), 317 U.S. 228, 236-237; 55 U.S.P.Q. 381, where Mr. Justice Jackson, in delivering the opinion of the court, stated:

> "The statutory requirement of particularity and distinctness in claims is met only when they clearly distinguish what is claimed from what went before in the art and clearly circumscribe what is foreclosed from future enterprise. * * * While we do not find it necessary to consider questions of novelty and invention, in the view we take of the claims in suit, a mere reading of prior art patents shows how, if they are read with the liberality and inclusiveness claimed for those in suit, they describe products, if not identical, at least of confusing similarity. Whether the vagueness of the claim has its source in the language employed or in the somewhat indeterminate character of the advance claimed to have been made in the art is not material. An invention must be capable of accurate definition, and it must be accurately defined, to be patentable. Cf. General Electric Co. vs. Wabash Corp., supra at 372-373 [37 U.S.P.Q. at 470]."

The courts below have dismissed the prior art patents with a wave of the hand, so to speak, insofar as these prior art patents disclose devices answering to the defini-

tion of the claims in suit. The courts below apparently have been persuaded by the fact that since the prior art patents did not *look like* the Knox patent, they did not anticipate it. Petitioner concedes that this view is permissible with respect to the issue of invention, but petitioner holds that it is clearly erroneous with respect to the issue of validity and the construction of the claims.

D. Question Is Supported by the Facts.

Petitioner conceives it to be a part of his obligation in this brief, in order to present a case with a prima facie worthiness of certiorari, to show that the question presented is not moot, but actually fits the facts in this controversy. Petitioner contends that the broad claims in suit of the Knox patent, numbers 1 and 15, read literally upon the prior art patents to Jeffries 174,533 (R. 474); Pratt 878,156 (R. 480); Naeser 1,414,147 (R. 524); Van Leuven, No. 1,655,481 (R. 547), and British patent 8262/1906 to Spencer (R. 564), and that the narrower claims, 2, 11 and 17, read upon each of the eighteen patents relied upon on appeal (R. 56) if they are read with the liberality and inclusiveness claimed for the patent in suit.

Petitioner concedes that there is no six wheel attachment for motor vehicles, or six wheel motor vehicle, in the prior art, fitted with a universal joint on the end of the rocker arm for connecting the same to a second axle, and having the opposite end of the rocker arm connected to the free end of a leaf spring, as is disclosed

by the drawings of the Knox patent in suit. It is due to this fact that the courts below were able to find invention present in the Knox patent. Knox himself testified that all that he did was to add the universal joint to the old structure brought to him by Stebbins (R. 71), which was the same structure as is disclosed in Figure 1 of the Knox patent, less the universal joint. While there is, therefore, no vehicle in the prior art which is a Chinese copy of Figure 1 of the Knox patent, the patents to Jeffries 174,533; Pratt 878,156; Naeser, 1,414,147; Van Leuven, No. 1,655,481; and British patent to Spencer 8262/1906, each of which is prior to Knox, contains all the elements of the Knox invention as defined in the claims. The structure of Van Leuven 1,655,481 was fitted with a leaf spring 29 in lieu of the rocker arm and universal joint combination of Knox. The leaf spring, being relatively rigid, fully resembles the rocker arm of Knox and performs its function. The leaf spring has its front end connected to the added axle 41, and has its other end connected to the free end of the leaf spring of the main axle of the vehicle. By virtue of the flexibility of the leaf spring, there is provided limited universal movement between the frame of the vehicle and the axle. Mr. Knox testified that a leaf spring is the equivalent of a universal joint to a limited extent (R. 112-113).

> "Q. Is it your position, then, that a leaf spring is the equivalent of the universal joint?
>
> A. They perform the function of a universal joint, to a limited extent."

The structures of Knox and Van Leuven are, therefore, substantially identical except for the universal joint.

Those claims of Knox which do not call for a universal joint, but call for universal means, such as claims 2 and 15, read directly and literally on Van Leuven. Claims 2, 11 and 17 of Knox read on Van Leuven when allowance is made under the doctrine of equivalents for substitution of the leaf spring for the universal joint. Certainly, it is fair and just to substitute the leaf spring of Van Leuven for the universal joint of Knox, if it is fair to substitute the rubber bushing of Feather Ride for the universal joint of Knox. If the terms are permitted to be construed to include one equivalent, they must also be capable of construction to include any known equivalent. The rubber bushing is shown to be an old equivalent of a universal joint in Fageol No. 1,692,891 (R. 555).

In order not to labor this brief with detailed comparisons of structures responsive to the claim terminology, and in order to present such data in more lucid fashion for the convenience of the court, petitioner has prepared, in Appendices 1 to 5, attached to the brief, parallel vertical columns illustrating how each of the five claims of the Knox patent in suit may be read, first, by way of comparison, upon Figure 1 of the Knox disclosure itself as the structure supporting the claims, and then in succession upon the Feather Ride structure (R. 310A); Spencer British patent No. 8262 (R. 560); Jeffries, No. 174,533 (R. 474); Pratt, No. 878,156 (R. 479); Naeser, No. 1,414,147 (R. 523), and Van Leuven, No. 1,655,481 (R. 547). Reference is made thereto for detailed inspection of how the claims of Knox literally read upon Van Leuven and, with the same construction

as used to read upon Feather Ride, read upon the other patents mentioned.

E. The Claims Should Be Examined.

In *Jungersen v. Ostby and Barton Company* (1949), 335 U.S. 560; 69 S. Ct. 269; 80 U.S.P.Q. 32, 33, the Court looked to the claims to determine the subject matter of the invention.

In *Graver Tank & Manufacturing Company, Inc. v. Linde Air Products Company* (1949), 336 U.S. 271, 277; 69 S. Ct. 535; 80 U.S.P.Q. 451, 453, the court held that it is the claim which measures the grant to the patentee, citing numerous precedents. The District Court, whose judgment was affirmed after finding from examination of the novel results obtained that the patentees did invent something, is quoted by this Honorable Court as saying:

> "Since the patentees did invent something patentable over the prior art of electric welding, the collateral questions of what constitutes their invention, and what are the boundaries, become pertinent."

This Court then continues:

> "He [the judge] concluded that what was really invented was that which was *claimed* and bounded by" certain designated claims. (Emphasis supplied.)

At the same time, the District Court found that a number of the claims did not define the invention and held them invalid, in which he was also sustained by this Honorable Court.

There has been no such examination of the claims in the case at bar by either the District Court or the Court of Appeals. These courts have assumed, because they were impressed that invention was present, that the patent was valid. *There may as well have been no claims so far as their deliberations were concerned.*

II. The Claims Have Been Rendered Functional by Construction.

In the instant case, the Court of Appeals has found (R. 581-582) that there was identity of function between the operation of Knox and the Feather Ride structure, and then concluded therefrom, first, that there was identity of structure (R. 582), and, second, that infringement necessarily results therefrom (R. 582). It is submitted that such application of the doctrine of equivalents is laid upon too broad a basis, even without regard to the prior art. It is repugnant to logic and fact that identity of operation and identity of function *necessarily result* in identity of structure. If this were so, all devices which accomplish a given result would infringe all patents which teach a means of obtaining that result. Such reasoning and application of the doctrine of equivalents overlooks entirely the infirmity of, and repugnance attached by the patent law to, claims defined functionally. For the purpose of such application of the doctrine of equivalents, the claims may as well have been defined in the terms stated in the object of the patent.

The landmark case holding that claims may not be defined in such broad scope as to be nothing more than

statements of objects is *O'Reilly v. Morse* (1853), 56 U.S. (15 How.) 62, 112 et seq. It will be recalled that that case involved Morse's invention of the telegraph. There was no dispute that the claim as recited defined Morse's invention, but the objection to the claim was that because it was stated in terms of results, rather than apparatus, it defined more than the apparatus which he had invented. Morse's invention, of even such a basic device as the telegraph, was limited by the court to a specific form of apparatus.

A. Decisions Supporting the Proposition.

The principle of law that functional claims are improper has been followed by the Supreme Court in numerous cases up to the present time. In *Holland Furniture Company v. Perkins Glue Co.* (1928), 277 U.S. 245, the Court stated, on page 256:

> "But an inventor may not describe a particular starch glue which will perform the function of animal glue and then claim all starch glues which have those functions."

The principle is also followed in *General Electric Co. v. Wabash Appliance Corp.* (1938), 304 U.S. 364, 369; 37 U.S.P.Q. 466, 468, the court saying:

> "The limits of a patent must be known for the protection of the patentee, the encouragement of the inventive genius of others and the assurance that the subject of the patent will be dedicated ultimately to the public. The statute seeks to guard against unreasonable advantages to the patentee and disadvantages to others arising from uncertainty as to their rights."

Other cases barring the functional claim are *Universal Oil Products Co. v. Globe Oil & Refining Co.* (1944), 322 U.S. 471; 61 U.S.P.Q. 382; and *Halliburton v. Walker* (1946), 329 U.S. 1; 71 U.S.P.Q. 175.

B. Comparison of Instant Case with Halliburton Oil Well Cementing Co. v. Walker.

The case of *Halliburton Oil Well Cementing Co. v. Walker* (1946), 329 U.S. 1; 71 U.S.P.Q. 175, presents facts and questions of law substantially on all fours with the instant controversy. In that case, the question decided was whether the claims sufficiently defined the invention at the exact point of novelty, as required by R.S. 4888 (Act of March 3, 1915, Ch. 94, Sec. 1, as amended; 35 U.S.C. 33).

In the *Halliburton v. Walker* case, Walker combined in one apparatus the prior art devices shown in two prior art patents. The court sums up Walker's invention in the following words, on pages 6-7 [U.S.P.Q. 177]:

> "Walker's contribution which he claims to be invention was in effect to add to Lehr and Wyatt's apparatus a well-known device which would make the regularly appearing echo waves more prominent on the graph and easier to count."

The Halliburton device, alleged to infringe, used an electric filter in combination with the Lehr and Wyatt device for the same purpose and with the same results as obtained by Walker. The Supreme Court held that Walker's claims are invalid under R.S. 4888 as defining the invention in functional terms at the point where

novelty began. The invidiousness of the claims is stated by Mr. Justice Black on page 12, in these words:

> "Under these circumstances the broadness, ambiguity, and overhanging threat of the functional claim of Walker become apparent. What he claimed in the court below and what he claims here is that his patent bars anyone from using in an oil well any device heretofore or hereafter invented which combined with the Lehr and Wyatt machine performs the function of clearly and distinctly catching and recording echoes from tubing joints with regularity. Just how many different devices there are of various kinds and characters which would serve to emphasize these echoes, we do not know. The Halliburton device, alleged to infringe, employs an electric filter for this purpose. In this age of technological development there may be many other devices beyond our present information or indeed our imagination which will perform that function and yet fit these claims. And unless frightened from the course of experimentation by broad functional claims like these, inventive genius may evolve many more devices to accomplish the same purpose. See United Carbon Co. et al. v. Binney & Smith Co., 317 U.S. 228, 236 [55 U.S.P.Q. 381, 385-386]; Burr v. Duryee, 1 Wall. 531, 568; O'Reilly, et al. v. Morse, et al., 15 How. 62, 112-13. Yet if Walker's blanket claims be valid, no device to clarify echo waves, now known or hereafter invented, whether the device be an actual equivalent of Walker's ingredient or not, could be used in a combination such as this, during the life of Walker's patent."

In the instant controversy between Six Wheel Corporation and Pointer, Knox added a universal joint to the end of the rocker arm in the combination brought to him by Stebbins (R. 71), which is the disclosure of Figure 1 of the Knox patent less the universal joint (R. 75-76, 114-115). The Stebbins vehicle was, therefore,

prior art to Knox. The structure disclosed by the Van Leuven patent No. 1,655,481 (R. 547) is similar both to Stebbins and Knox. It will thereby be seen that the framework of the vehicle suspension, or the combination, using the term "combination" in the generic sense, was old when Knox entered the field. The Stebbins vehicle, or the Van Leuven vehicle, corresponds in the instant case to the apparatus of Lehr and Wyatt in the *Halliburton v. Walker* case. The universal joint for performing the same function as it performs in Knox, which Knox added to the combination, is old, as shown in any number of patents. See for example, the patent to Laisne, No. 1,316,369 (R. 518); to McCracken, No. 1,527,987 (R. 533); to Collard, No. 1,131,-118 (R. 503); and to Smith, No. 1,111,924 (R. 496). Each of these patents discloses a rocker arm pivotally supported by hanger brackets secured to a vehicle frame, means for securing one end of the rocker arms to one end of the springs supporting the rear end of the frame, and a universal joint for securing the opposite end of the rocker arm to the axle. In Laisne, page 1, lines 89-92 (R. 521), it is stated:

> "The outer end of each lever c is connected by means of a universal joint, for instance an enclosed ball joint, to the corresponding axle."

In McCracken, page 1, lines 60-64 (R. 535), it is stated:

> "It is a further object of this invention to provide a universal joint connection between the levers abutting one of such springs and the axle whereby no twisting strain is put upon the levers or upon the pivots thereof."

It will thereby be seen that the universal joint which Knox added to the old combination of Stebbins corresponds to the old tubal resonator and coupler of Tucker which Walker added to the apparatus of Lehr and Wyatt.

III. The Prior Art Patents Cited by Petitioner are Competent References.

The Court of Appeals for the Ninth Circuit, as well as the District Court for the District of Oregon, appear to have disregarded the prior art patents cited by the petitioner, apparently on the ground that they were "paper" art, or related to non-analogous art, and, therefore, were not entitled to any weight. It will be noted that the District Court, in Finding 20 (R. 23), found that the prior art patents relied upon by the defendant were "either impractical or inoperative." Petitioner objected to this finding in his Point (5) in his Statement of Points (R. 53). The Court of Appeals in its opinion (R. 578) stated: "The art, it should be observed, is chiefly 'paper' art. No structure constructed according to the teachings of the claimed prior art was introduced in evidence." The Court quoted (R. 579) the statement of petitioner's expert relative to British patent 214,080 (not before the Court of Appeals on appeal), that he doubted "whether it would work out to be practical." No such testimony was adduced relative to British patent 8262/1906 to Spencer. Again, the Court of Appeals found (R. 579) "that most of the prior patents related to the bogie (or railroad) art, a different, non-analogous

art, with different problems, * * *." The only railroad bogie patents before the Court of Appeals was Jeffries 174,533 and the British patent to Spencer 8262/1906.

Petitioner submits that the Court of Appeals' declarations concerning the prior art, as quoted above, are not in accord with the evidence, and reflect a view contrary to the adjudicated decisions of the United States Supreme Court. The adoption by the Court of Appeals of such an arbitrary view, without differentiation as to any of the prior art patents, has resulted in disqualifying all the prior art offered in evidence by the petitioner. Regardless of the merits of the views of the Court of Appeals with respect to any of the prior art patents relative to their use for anticipating *invention* by Knox, petitioner submits that all of the prior art patents are entitled to the full weight of their disclosures for the purpose of determining whether the claims of the Knox patent in suit read upon these prior art patents. The denial of such weight to prior art patents, in a reported decision of the Court of Appeals for the Ninth Circuit is believed to constitute a dangerous precedent in law, and, therefore, the decision should be reversed.

Petitioner submits that it is such common practice both before the United States Patent Office, and in infringement suits, to introduce as competent evidence of prior art the soft copies of patents and copies of other printed descriptions, that the court may take judicial notice thereof. Petitioner knows of no adjudicated case holding that prior art must be evidenced by either actual, physical structures, or proof of their existence and successful operation. In fact, the converse is so well

accepted that the question is believed never to have arisen.

A. Adjudicated Decisions.

It was held in *Cohn v. U. S. Corset Co.* (1876), 93 U.S. 366, 370, that the provisional specification for an English patent which was printed and published was fatal to validity of a later U. S. patent if in fact it sufficiently described the manufacture described and claimed in the U. S. patent. *No structure was introduced in evidence.*

In *Pickering v. McCullough* (1881), 104 U.S. 310, 319, in response to the objection that the machines described in anticipating patents were mere paper machines, not capable of successful practical working, the Supreme Court held:

> "It is objected, however, that the machines described in these patents are mere paper machines, not capable of successful practical working. But on examination it sufficiently appears, we think, that the objections can be sustained only as to minor matters of detail and construction, not affecting the substance of the invention claimed, and could be removed by mere mechanical skill, without the exercise of the faculty of invention. In this view, the Wise and Smith Patents are not rendered inefficient as defences in this suit by reason of the alleged imperfections of the machines described in them."

Walker on Patents (Deller's Edition), Vol. 1, page 272, states the rule thus:

> "Mere paper patents may negative otherwise patentable novelty, provided they sufficiently disclose the

principles of the alleged invention, or provided the alleged objections to operativeness can be obviated by mere mechanical skill."

In *Dashiell v. Grosvenor* (1895), 162 U.S. 425, 432, the Supreme Court stated:

"The very fact that a machine is patented is some evidence of its operativeness, as well as of its utility, and where a model is constructed after the design shown in a patent which is not perfectly operative, but can be made so by a slight alteration, the inference is, that there was an error in working out the drawings, and not that the patentee deliberately took out a patent for an inoperative device."

In *Smith v. Hall* (1937), 301 U.S. 216, 232, it was held that the fact that a prior inventor's structure for using the method of the patent in suit was neither the best possible nor as skillfully designed or used as that later employed by the patentee of the patent in suit was not material to the competency of the prior art disclosures as anticipations.

It was pointed out in *Electric Storage Battery Co. v. Shimadzu* (1939), 307 U.S. 5, 11, that the elements which preclude patentability under statute, referring to R. S. 4886 (Act of March 3, 1897, Ch. 391, Sec. 1, 29 Stat. 692, as revised; 35 U.S.C. 31) "are a patent, or a description in a printed publication in this or any foreign country, which antedates the invention or discovery of the applicant". After the patent has issued, the applicant is, of course, the patentee. The statute cited is as follows:

"Any person who has invented or discovered any new and useful art, machine, manufacture, or com-

position of matter, or any new and useful improvements thereof, or who has invented or discovered and asexually reproduced any distinct and new variety of plant, other than a tuber-propagated plant, not known or used by others in this country, before his invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof, or more than one year prior to his application, and not in public use or on sale in this country for more than one year prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law, and other due proceeding had, obtain a patent therefor."

B. Findings of the Courts Below Are not Supported by the Evidence.

Petitioner submits that Finding 20 of the District Court, insofar as it declares the prior art patents to be "inoperative", is unsupported by any evidence. There is no evidence to support this finding. The most adverse statement about any of the references is that they may have been impractical (R. 252, 253, 254). No criticism was made of the patent to Jeffries 174,533 (R. 474), the patent to Pratt 878,156 (R. 479), the patent to Naeser 1,414,147 (R. 523), the patent to Van Leuven 1,655,481 (R. 547), or the British patent to Spencer 8262 (R. 560).

The Court of Appeals is literally correct in its statement (R. 578) that "No structure constructed according to the teachings of any of the claimed prior art was introduced in evidence.", but the existence of a physical embodiment of patent 1,655,481 to Van Leuven may be

conclusively presumed from the record. It was shown (R. 120) that the patent to Van Leuven was owned by the respondent, and that the respondent had successfully maintained suits for infringement based upon this patent. See *Six Wheel Corporation v. Sterling Motor Co. of California,* 40 F. (2d) 311. See also plaintiff's Exhibit No. 77 (R. 447) showing writ of injunction obtained against the Fager Corporation and J. M. Hellen to prevent infringement of Van Leuven patent No. 1,655,481. It is believed that the court may take judicial notice from such evidence that the Van Leuven patent represented an actual, working structure.

IV. Petitioner's Structure Follows the Prior Art More Closely than it Follows Knox.

> Whether, in a patent infringement suit, defendant who approximates a prior art structure can be held to infringe the patent in suit by reason of the court's finding that the said prior art structure resides in a non-analogous art?

This question involves three considerations, viz.: (1) a comparison of petitioner's Feather Ride structure with the prior art, (2) the principle of law that the petitioner's alleged infringing structure should be compared with the prior art, and, if found to be more comparable with the prior art than with the patented device, is non-infringing; and (3) the question of whether the prior art relied upon by the petitioner is non-analogous as adjudicated by the Court of Appeals, and, if so, whether it is available to the petitioner as a defense.

A. Feather Ride Compares with Spencer British Patent 8262/1906.

Certain of the patents which were before the Court of Appeals as exhibits disclose structures which are in all respects similar to the Feather Ride suspension. One of these is the British patent to Spencer, 8262 of 1906. The Spencer patent is, however, for a railroad bogie, which the Court of Appeals said (R. 579) relates to "a different, non-analogous art, with different problems * * * ." Nevertheless, the similarity between the Feather Ride structure and Figure 1 of the Spencer patent is quite pronounced and obvious at a glance. If comparison is made with the lowermost illustration on Exhibit 75, it will be discovered that each element of the Feather Ride suspension is duplicated by an equivalent element in the British structure. In each of the two illustrations the right hand end of the frame is broken away to indicate that the forward end of the frame is toward the right hand edge of the sheet. In each structure the forward end of a solid front beam is pivotally secured to the vehicle frame. The foremost of the rear axles is mounted midway of the length of the rear beam, and in each instance the means of attachment of the axle to the beam is such that a universal swivel connection is achieved. The rearward end of the front beam is connected to the forward end of a rear beam by means of a flexible connection. In the Feather Ride suspension the connection between the front and rear beams is by means of shackle pins mounted in rubber. In the British structure the connection takes the form of a pivoted hanging bolt q on which a spring d is threaded which

supports the free end of the rear beam. In the Feather Ride suspension the rear beam is a solid beam and is pivoted intermediate its length by means of the trunnion on which is mounted the spring rider. In the British structure the rear beam is in the form of a laminated spring which is pivoted intermediate its length on pin n. The universal swivel connection between the rear axle and the rear beam in the British structure is similar to the connection between the foremost axle and the front beam. In the Feather Ride suspension each of the axles is connected to the respective beams by the T-casting and rubber filled housing hereinbefore described. Petitioner's witness Mackie testified that the mode of operation of the British suspension and the mode of operation of the Feather Ride suspension is substantially the same (R. 147).

B. Feather Ride Compares with Patent No. 1,534,458 to Mohl (R. 539).

Should the court be persuaded that the testimony of plaintiff's witness Knox was correct when he stated that the front beam of the Feather Ride suspension is a spring, then and in that event appellant invites attention to the structure illustrated and described in the patent to Mohl 1,534,458. The front beam of the Feather Ride is pivotally connected at its forward end to the vehicle frame, and is connected at its rearward end to a rear beam. The foremost of the rear axles is mounted midway the length of the front beam. In the Mohl structure, the spring a is pivotally connected to the vehicle frame at b and is flexibly connected to the rear

beam at c. The foremost of the rear axles m is mounted midway of the length of the spring. [Respondent's witness Knox testified that a leaf spring is the equivalent of a universal joint (R. 112-113 and 127).]

In both the Mohl structure and the Feather Ride suspension the rear beam is in the form of a rigid beam, and in each instance the beam is pivoted intermediate its ends with the rear axle mounted on the free end of the beam.

Should the court find it to be true that a leaf spring and a beam are equivalent structures, and that in the Feather Ride suspension the front beam is the equivalent of the spring 3 in the Knox structure (R. 101); and should the court likewise find it to be true that a leaf spring is the equivalent of a universal joint, then it is respectfully submitted that in the Mohl patent is to be found a disclosure of the combination of elements or their equivalents employed in the Feather Ride suspension. It follows as a matter of law, therefore, that if the Feather Ride suspension infringes the claims of the Knox patent in suit, then by the same token the patent to Mohl 1,534,458 is a complete anticipation of the structure defined by those claims.

C. The Law Is That if the Defendant's Device More Closely Follows the Prior Art Than the Patent in Suit, It Is not an Infringement.

In *Dashiell v. Grosvenor* (1895), 162 U.S. 425, 433-434, the Supreme Court held:

"But whether the Nordenfeldt device [prior art] be an exact anticipation or not, the Dashiell device [the alleged infringement] differs from the Seabury patent [patent in suit] much more than the latter differs from the Nordenfeldt machine, * * * and, in our opinion, Dashiell's device is as great a departure from Seabury's as the latter is from the devices which preceded it.

"We are therefore of opinion that, under the construction we are compelled to give the first claim of the Seabury patent, the Dashiell device is not an infringement."

In *Bragg-Kliesrath Corp. v. Walter S. Vogel & Co.* (C.A. 2, 1933), 67 F. (2d) 531, 532, where a patent was held valid but not infringed, Circuit Judge Learned Hand, delivering the opinion of the court, after finding that the plaintiff's patent was not anticipated by the prior art, stated:

"We turn to the defendant's apparatus, since on the issue of infringement it is this which should be compared with the prior art."

D. Non-Analogous Art.

Petitioner believes that the courts below have found erroneously that the railroad bogie is non-analogous art —at least insofar as it applies to the Feather Ride structure. Webster defines a bogie as a low, strongly built truck or cart. The plaintiff has attempted, and the courts below have apparently gone along with it, to attach to the connotation of bogie that of "railroad bogie." However, it is believed that the mere denomination of railroad car bogies, as such, does not make them non-

analogous art. As defendant's witness, Dr. James d'A. Clark said (R. 228):

> "Originally, railway vehicles were all patterned after road vehicles, so, if you care to carry what you call the 'bogie art' back far enough——"

the problem of supporting the load and distributing the weight equally to four wheels is the same in both railroad and land vehicles. It may be that railroads do not present quite as much variation in surface regularity as vehicle roads, but some railroads are known to be pretty rough. It is well known that many land vehicles employ a four wheel truck. Regardless of whether the railroad bogie is analogous or non-analogous art, petitioner submits that he is entitled to pattern his vehicle suspension after the disclosure of Spencer without penalty of infringement of the Knox patent. Petitioner also submits that to the extent that the Knox claims are construed in such a manner that they read upon a railroad bogie, whether it be analogous or non-analogous art, they are invalid, and that the gravamen of such claims construction is all the more objectionable if the prior art device is non-analogous, for such construction indicates that the patentee has not even limited his claims to the art in which he claims to have made his invention.

The Court of Appeals for the Sixth Circuit, in *International Steel Wool Corp. v. Williams Corp.* (1943), 137 F. (2d) 342; 58 U.S.P.Q. 372, in considering whether invention is involved in applying old device to new use, say:

> "Analogy depends not merely upon similarity of purpose, but upon similarity of elements * * * Inven-

> tion does not consist in the mere conception of applying an old method or device to a new use, if the new use is so analogous to the old that the thought of adapting the device and applying it to the new use would occur to a person skilled in the art and seeking to devise means to perform the desired function. In such case even though changes or modifications are essential to the practical application of the method or device to the new use, invention is not involved."

In *Thomson Spot Welder Co. v. Ford Motor Co.* (1924), 265 U.S. 445, it was held that transferring a device from one art to a closely similar or analogous art without making any material change in the construction of the device or in the manner of its application did not constitute invention. If the railroad bogie art is not an analogous art, it is at least a closely similar art, and the devices thereof are capable of transferrence to the road vehicle art without making any material change in the construction of the device or in the manner of its application as illustrated by the manner in which Feather Ride follows Spencer.

In *Vandenburgh v. Truscon Steel Co.*, 277 F. 345, the Court of Appeals for the Sixth Circuit held that in considering the patentability of a concrete reinforcing bar in which all invention must reside in the particular way employed to connect a spiral loop to a vertical or spacing member, prior art is not confined to reinforced concrete construction alone but methods of securing such parts in the arts generally, and particularly in the metal-working art, are relevant. The Supreme Court affirmed the Court of Appeals (1923), 261 U.S. 6, 15, saying:

"It may be true that in the field of reinforcing concrete the kerf and spur had not been used before as Vandenburgh used it, but the kerf and spur were old in the art in kindred fields. They were old in metal working art."

The law on the matter is well put in the case of *Robinson v. Tubular Woven Fabric Co.* (D.C., R.I., 1917), 248 F. 526, 542, holding as follows:

"What is prior art is a matter that cannot be determined arbitrarily, nor merely by a restriction of the claim to a special use.

"If the thing is old, and is applied to perform its old functions, it remains in the prior art, and cannot be made novel, in the sense of the patent law, merely because used in new surroundings, that do not affect its character or mode of operation."

The District Court was affirmed, 524 F. 304.

Cases Believed to Sustain Jurisdiction

In *Halliburton Oil Well Cementing Co. v. Walker,* 329 U.S. 1; 71 U.S.P.Q. 175, certiorari was granted in view of the alleged failure of the claims to meet the statutory requirements of R.S. 4888, 35 U.S.C. 33, as that statute was interpreted in *General Electric Co. v. Wabash Appliance Corp.,* 304 U.S. 364. The same question is involved here on the same issue, and also on a companion issue with respect to the prior art.

In *Lincoln Engineering Co. of Illinois v. Stewart Warner* (1938), 303 U.S. 545; 37 U.S.P.Q. 1, certiorari was granted because of alleged conflict between the holding in the Court of Appeals below and prior deci-

sions of the Supreme Court. The instant case is believed to be contrary to a number of Supreme Court decisions as pointed out in the section in the petition entitled "Reasons for Allowance of the Writ" and in the section on "Argument."

In *United Carbon Co. v. Binney & Smith Co.* (1942), 317 U.S. 228; 55 U.S.P.Q. 381, certiorari was granted because of importance of questions of novelty, invention, infringement, and definitions of the claims. The questions of infringement and definitions of the claims are before the Court in this case.

Certiorari was granted in the case of *Electric Storage Battery Co. v. Shimadzu* (1939), 307 U.S. 5; 41 U.S.P.Q. 155, to decide novel questions of law. There was no conflict in Circuit Court decisions or between the lower courts in the case. The present case presents a novel question of law, which is: "Are claims invalid which read on the prior art?"

CONCLUSION

We respectfully submit that the Petition for Writ of Certiorari should be granted, for the reason:

The claims of the patent in suit encompass more than the Knox invention and do not "particularly point out and distinctly claim the part, improvement or combination" which the inventor claims is his invention or discovery, as required by R.S. 4888 (Act of March 3, 1915, Ch. 94, Sec. 1, as amended; 35 U.S.C. 33).

The decision of the Court of Appeals herein is contrary to and in conflict with applicable decisions of this Court which hold that claims which are originally functional in their definitions of the invention are invalid, as in *Halliburton Oil Well Cementing Co. v. Walker*, supra, and calls for an exercise of this Court's power of supervision.

The District Court and the Court of Appeals attributed but little weight to the prior art cited by petitioner for the reason that they were of the opinion that this art was "either impractical or inoperative" (R. 23, 578). The courts have erred in this respect for the reason that (1) there is no evidence to support a finding of inoperativeness of the prior art; (2) but two of the patents relied upon on appeal relate to the bogie (or railroad) art, which petitioner contends is an analogous art with similar problems; and (3) the inference by the Court of Appeals that actual working structures of the prior art should be introduced in evidence to warrant consideration of prior art is contrary to law and established practice.

The device complained of follows the prior art more closely than it follows the teaching of the patent in suit, and so does not infringe.

Wherefore, it is prayed that the Court grant the Petition for Writ of Certiorari to the Court of Appeals for the Ninth Circuit.

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APPENDIX 1

Appendix 1—Readi

Claim 1 of Knox, No. 1,926,727 (R. 300)	Figure 1 of Knox Disclosure (R. 296)	Feather Ride Structure—Plaintiff's Exhibit 3-A (R. 310A)	Spencer, British Patent 8 (R. 564)
(1) In a six wheel attachment for motor vehicles, the combination of	(1) The wheel to the left and its associated parts.	(1) Feather Ride is not a six wheel attachment for a motor vehicle. It is a tandem axle, four wheel suspension, with a nest of coil springs disposed intermediately of the two axles and between the rear beam and the vehicle frame.	(1) Spencer shows a railr having two axles. Since the left) axle in Knox is axle, and is the axle con rocker arm, let the front axle of Spencer which is t ciated with the rocker arm
(2) a frame,	(2) Frame designated by the numeral 1.	(2) The frame of the vehicle is clearly shown.	(2) The frame in Spencer by the letter b.
(3) a pair of hanger brackets secured to the frame,	(3) Brackets 6.	(3) The front beam bracket is designated.	(3) The pivotal connecti tered) to the frame of the the rocker arm.
(4) rocker arms pivotally supported by the brackets,	(4) Rocker arm 8, or, in Figures 6, 7 and 8, rocker arm 30a.	(4) The front beam.	(4) The front equalizing the front axle.
(5) means for securing one end of the arms to one end of the springs supporting the rear end of the frame,	(5) Presumably reference is to shackle 9 which connects the rear end of rocker arm 8 to one end of leaf spring 3 supporting the rear end of the frame.	(5) Assuming that the rear beam and coil springs correspond to the leaf spring on the main axle shown in Knox, then reference is to the shackle, connecting the front beam to the rear beam.	(5) The shackle-like devic by Spencer as a pivoted h secures the rear end of le end of the springs a suppo end of the frame.
(6) an axle,	(6) Presumably reference is to the attachment axle 10.	(6) The axle secured to the front beam,	(6) The front axle.
(7) universal means for securing the axle at the opposite sides of the frame to the rocker arms,	(7) Presumably, reference is to the universal joint enclosed within the yoke 11 on the front end of the rocker arm and shown in detail in Figure 3; in Figures 6, 7 and 8 it is the structure shown at the left end of the rocker arm.	(7) The rubber cushion surrounding the T casting, as shown in Section A-A,	(7) Universal means is pro transverse pin v (Fig. 5) a of the equalizing lever h w between guides w projecti from the top of the axle bo
(8) and wheels journaled on the axle.	(8) Wheels 5.	(8) Front wheels as indicated.	(8) The front wheels as dotted line.

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ng of Claim 1 of Knox on the Prior Art

3262—Figure 1	Jeffries, Patent No. 174,533—Figure 2 (R. 474)	Pratt, Patent No. 878,156 (R. 480, 481, 484)	Naeser, Patent No. 1,414,147 (R. 524)	Van Leuven, Patent No. 1,655,481 (R. 547)
ilroad car truck the front (to s the auxiliary nnected to the (to the right) the axle asso-rm, respond.	(1) Jeffries shows a railroad car truck having two axles. Either one of the axles may be regarded as a six wheel attachment for a motor vehicle, but since the front (to the left) axle in Knox is the auxiliary axle, let the front (left) axle of Jeffries be regarded as the six wheel attachment.	(1) Pratt discloses a six-wheel suspension for motor vehicles. The axle and wheels intermediate the front and extreme rear axle may be considered the six-wheel attachment.	(1) Naeser shows a pair of axles and wheels thereon connected to a frame. Let the axle to the right in Figure 1 be considered as the main axle to the vehicle and the axle to the left be considered as the six wheel attachment.	(1) Van Leuven has a six wheel attachment for motor vehicles.
er is designated	(2) Although not labeled, the frame is clearly evident.	(2) The frame is identified by reference numeral 1.	(2) Designated by the numeral 1.	(2) Designated as number 11 in Van Leuven.
ction (not let-the front end of	(3) These are the brackets attached to the frame intermediate the two axles, and to which the rocker arm H is pivotally connected.	(3) The leaf springs 8 and associated U-bolts constitute hanger brackets secured to the frame, inasmuch as they serve the function of pivotally connecting the rocker arm (9) to the frame.	(3) Consider the turned portion at the left end of the frame designated by the numeral 2 as a hanger bracket.	(3) Designated by the numeral 35 in Van Leuven.
g lever h, over	(4) Rocker arm H.	(4) The "rocker arms" are the levers 9.	(4) Arm 10 on the left end is pivotally connected at 9 to bracket 2.	(4) The leaf spring 29 is a rocker arm.
evice designated d hanging bolt q f lever h to one pporting the rear	(5) There is a pin connecting rocker arm H with spring G'. Spring G' supports the rear end of the frame.	(5) The "springs supporting the rear end of the frame" are the springs 8, and the inner end of each arm of the lever 9 is secured to the spring by U-bolts.	(5) The sleeve member 7 is connected by pin 8 to the spring 5. Spring 5 may be considered as supporting the rear end of the frame.	(5) Shackle 27 secures one end of the rocker arm (spring) 29 to the fore end of the main spring over the rear axle supporting the rear end of the frame.
	(6) This element in the Knox claim presumably refers to the attachment axle—the axle to the left.	(6) The axle 17 corresponds to the axle of the attachment in both Knox and Feather Ride.	(6) The axle designated by numeral 3.	(6) The axle designated by numeral 41.
provided by the 5) at the center h which extends ecting upwardly e box m.	(7) Front leaf spring G and the vertically slidable axle box D' labeled in Figure 1, obviously permit angular displacement of the front axle transversely of the frame. It has been established by Knox's own testimony that a leaf spring is the equivalent of a universal joint (R. 112-113).	(7) The interlocking clevises 18 constitute universal means for securing the axle 17 at opposite sides of the frame to the rocker arms. The bearing 13a (Fig. 11) for the rear or main axle is also "a flexible and to a limited extent universal joint" (Page 1, lines 89-94—R. 484) connecting the rear end of rocker arm 9 to the rear axle 13 in the same way that the rear beam of Feather Ride is connected to the rear axle with a universal means.	(7) The axle 3 is slidably mounted on the rocker arm 10 by means of slipper 11 providing for fore and aft movement of the axle. Up and down movement of the axle is provided by the fact that the rocker arm 10 is pivotally connected at point 9 to bracket 2. A pivotal joint 16 permits canting of the axle in a horizontal plane as when one wheel on the axle moves horizontally to a different degree from the other wheel (lines 85 to 89, page 1, of the patent—R. 525).	(7) This is the combination of furcated bracket 39 and leaf spring 29. It has been established by Knox's own testimony that a leaf spring is the equivalent of a universal joint (R. 112-113).
as indicated in	(8) The wheels to the left in Figure 2.	(8) The wheels 20.	(8) Wheels designated 17 at the left end in Figure 1.	(8) Wheels 43.

APPENDIX 2

Appendix 2—Reading of Claim 2 of Knox

Claim 2 of Knox, No. 1,926,727 (R. 300)	Figure 1 of the Knox Disclosure (R. 296)	Feather Ride Structure—Plaintiff's Exhibit 3-A (R. 310A)	Spencer, British Patent 8262—Figure 1 (R. 564)	Jeffries Pate
(1) In a six wheel attachment for motor vehicles, the combination of	(1) The wheel to the left and its associated parts.	(1) Feather Ride is not a six wheel attachment for a motor vehicle. It is a tandem axle, four wheel suspension, with a nest of coil springs disposed intermediately of the two axles and between the rear beam and the vehicle frame.	(1) Consider the front wheel (to the right) and associated parts to be the six wheel attachment.	(1) Jeffries s having two ax may be regar ment for a m front (to the auxiliary axle of Jeffries be attachment.
(2) an axle,	(2) The axle 10.	(2) The front axle.	(2) The axle (not numbered) is plainly indicated.	(2) Consideri hand side of to the fixed or the axle on th considered as axle called for
(3) wheels journaled on the axle,	(3) Wheels 5.	(3) Wheels are as indicated.	(3) The wheels are indicated by the dotted circumferential line.	(3) The whee of Figure 2.
(4) a pair of rocker arms	(4) Rocker arms 8.	(4) The front beam, one on each side.	(4) Rocker arms are the equalizing lever h, one on each side.	(4) Rocker ar frame).
(5) means for pivotally supporting the rocker arms intermediate their ends from the vehicle frame,	(5) Presumably, reference is to bracket 6 and pivot pin 7.	(5) Feather Ride has no means for pivotally supporting the rocker arms intermediate their ends from the vehicle frame. The rocker arm is pivotally connected to the frame bracket at its front end.	(5) The rocker arms are not pivotally supported intermediate the ends from the vehicle frame, but are pivotally supported at the forward end to the frame by the pin connection. The same is true in Feather Ride.	(5) The deper side of the fra arms H to the
(6) universal swivel connecting means between the axle and one end of each rocker arm,	(6) Universal joint represented by the parts 11-19 and shown in detail in Figure 3.	(6) Feather Ride has no universal swivel connecting means between the axle and one end of each rocker arm. Feather Ride does have the rubber cushion positioned between the axle and the intermediate portion of the rocker arm.	(6) Spencer does not have universal swivel connecting means between the axle and one end of each rocker arm. Neither does Feather Ride. Universal swivel means is provided by the transverse pin v (Fig. 5) at the center of the equalizing lever h which extends between guides w projecting upwardly from the top of the axle box m.	(6) Front leaf slidable axle bo mit angular di axle transversel been establishe mony that a lea of a universal course, if respon term "universa means" to a uni closed in the K Jeffries or Peti joint, and there ment.
(7) and means for securing the opposite ends of the rocker arms to free ends of the rear springs of the motor vehicle.	(7) Presumably, shackle 9.	(7) Assuming that the rear beam and coil springs correspond to the leaf spring on the main axle shown in Knox, then reference is to the shackle connecting the front beam to the rear beam.	(7) The shackle-like device designated with the letter q by Spencer which he calls a pivoted hanging bolt secures the opposite end (opposite from the end connected to the frame) of the rocker arm to the free end of the leaf spring.	(7) The pin con H to the free en spring G′ being spring of the mo

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3262—Figure 1	Jeffries Patent No. 174,533—Figure 2 (R. 474)	Pratt, Patent No. 878,156 (R. 480, 481, 484)	Naeser, Patent No. 1,414,147 (R. 524)	Van Leuven, Patent No. 1,655,481 (R. 547)
wheel (to the ts to be the six	(1) Jeffries shows a railroad car truck having two axles. Either one of the axles may be regarded as a six wheel attachment for a motor vehicle, but since the front (to the left) axle in Knox is the auxiliary axle, let the front (left) axle of Jeffries be regarded as the six wheel attachment.	(1) The axle 17, wheel 20 and associated parts correspond to the six wheel attachment in Knox.	(1) Consider the front wheel (to the left) and its associated parts as the six wheel attachment.	(1) The six wheel attachment is the wheel 43 and associated parts immediately in front of the rear wheels.
ered) is plainly	(2) Considering the axle on the right hand side of Figure 2 as corresponding to the fixed or permanent axle in Knox, the axle on the left hand side may be considered as the auxiliary axle, or the axle called for by the claim.	(2) Axle designated at 17.	(2) The axle 3 as indicated.	(2) Axle designated at 41.
dicated by the ne.	(3) The wheels visible at the left end of Figure 2.	(3) Wheels 20.	(3) Wheels 17.	(3) Wheels 43.
the equalizing	(4) Rocker arms H (on each side of the frame).	(4) The levers 9, one on each side.	(4) The rod 10 at the left end, one on each side.	(4) Consider the leaf spring 29 as the rocker arms, one on each side.
e not pivotally the ends from e pivotally sup- d to the frame he same is true	(5) The depending brackets (on each side of the frame) connecting the rocker arms H to the frame.	(5) The springs 8 constitute "means" for pivotally supporting the rocker arms intermediate their ends from the vehicle frame.	(5) The rocker arm (rod 10) is not pivotally supported intermediate its ends to the vehicle frame, but is pivoted at its forward end to the vehicle frame (by pivot 9) as in Feather Ride.	(5) Bracket 35 pivotally supports the rocker arms (leaf spring 29) intermediate their ends from the vehicle frame.
have universal s between the ch rocker arm. ide. Universal d by the trans- he center of the ch extends be- ting upwardly box m.	(6) Front leaf spring G and vertically slidable axle box D′ (see Figure 1) permit angular displacement of the front axle transversely of the frame. It has been established by Knox's own testimony that a leaf spring is the equivalent of a universal joint (R. 112-113). Of course, if respondent intends to limit the term "universal swivel connecting means" to a universal joint such as disclosed in the Knox patent, then neither Jeffries or Petitioner has a universal joint, and there is no issue of infringement.	(6) The interlocking clevises 18 constitute universal swivel connecting means between the axle 17 and the forward end of each rocker arm 9.	(6) There are no universal swivel connecting means between the axle and *one end* of each rocker arm, but neither are there in Feather Ride. The axle is secured to the rocker arm by universal swivel connecting means by virtue of the slipper 11, the universal joint 16, and the rotatable connection of the rocker arm 10 with the bearing block 7 (page 1, lines 47, 75, and 85. Note particularly lines 75-81). (R. 525.)	(6) Strictly speaking, there are no universal swivel connecting means between the axle and one end of each rocker arm, but neither is there in Feather Ride, considering the front beam of Feather Ride as the rocker arm. However, the function of a universal connection between the pivotal support for the rocker arm and the axle is provided by the flexibility of the leaf spring. A leaf spring has been established as the equivalent of a universal joint (R. 112).
vice designated encer which he bolt secures the from the end of the rocker e leaf spring.	(7) The pin connecting the rocker arm H to the free end of the spring G′, the spring G′ being considered as the rear spring of the motor vehicle.	(7) The "rear springs" of the vehicle are the springs 8. The levers 9 and springs 8 are similar to the rear beams and coil spring assembly of Feather Ride. In Pratt and in Feather Ride, the same structure is included in "means for securing the opposite ends of the rocker arms to the free ends of the rear springs of the vehicle."	(7) The rotatable, slidable bearing block 7 connects the rocker arm to the leaf spring 5 which may be considered the rear spring of the vehicle.	(7) The shackle 27 secures the opposite end (opposite from the end connected to the axle) of the rocker arm to the free ends of the rear springs 21 of the motor vehicle.

APPENDIX 3

Appendix 3—Reading of Claim 11 o

Claim 11 of Knox, No. 1,926,727 (R. 301)	Figures 1 and 6, 7 and 8 of the Knox Disclosure (R. 296-298)	Feather Ride Structure—Plaintiff's Exhibit 3-A (R. 310A)	Spencer British Patent 8262—Figure 1 (R. 564)	Jeffries
(1) The combination with a six wheel attachment for motor vehicles of	(1) The wheel and axle shown on the left of Figure 1 with radius rod 21 and yoke 15 eliminated and the rocker arm 30a shown in Figures 6, 7 and 8 substituted for the rocker arm 8 shown in Figure 1.	(1) Feather Ride is not a six wheel attachment for a motor vehicle. It is a tandem axle, four-wheel suspension, with a nest of coil springs disposed intermediately of the two axles and between the rear beam and the vehicle frame.	(1) Spencer shows a railroad car truck having two axles. Since the front (to the left) axle in Knox is the auxiliary axle, and is the axle connected to the rocker arm, let the front (to the right) axle of Spencer, which is the axle associated with the rocker arm, respond.	(1) Jef having may be ment fo front (auxilian of Jeffr attachm
(2) a pair of combined radius and rocker arms,	(2) The combined radius and rocker arm is designated 30a. There is one on each side of the vehicle.	(2) The front beam on the front axle, by virtue of its pivotal connection to the frame at the front end, functions as a combined radius and rocker arm. The pair is accounted for by the beams on each side of the vehicle.	(2) The front equalizing lever h, over the front axle.	(2) Th radius the roc hanger combine
(3) means for pivotally mounting the rocker arms,	(3) Presumably, reference is to an adaptation of the hanger bracket 6 of Figure 1. Hanger bracket 6 could not be used as shown in Fig. 1, for it would position the attachment axle almost against the frame of the vehicle.	(3) The front beam bracket as designated.	(3) Rocker arm h is pivotally connected at its front end to the frame, as illustrated.	(3) The mounted frame, a
(4) means for securing one end of each rocker arm to the free end of a spring of the motor vehicle	(4) Presumably, reference is to shackle 9, which secures one end of the rocker arm to the free end of a spring of the motor vehicle.	(4) Assuming that the rear beam and coil springs correspond to the leaf spring on the main axle shown in Knox, then reference is to the shackle connecting the front beam to the rear beam.	(4) The shackle-like device, designated by Spencer as a pivoted hanging bolt q, secures the rear end of lever h to the free end of the vehicle spring *a*.	(4) The connecte sponds to by a pin,
(5) and universal swivel means for securing the opposite end of the rocker arm to the axle of the attachment.	(5) The universal swivel means is the ball and socket connection illustrated at the left in Figures 6, 7 and 8. The ball and socket joint secures the opposite end (opposite the end connected to the free end of the vehicle spring) to the attachment axle 10a.	(5) There is no universal *swivel* means for securing *the opposite end* of the rocker arm to the axle of the attachment. The rocker arm is secured intermediate its ends to the front axle through the medium of the rubber cushion surrounding the T casting, as shown in section A-A. (R. 310A)	(5) There is no universal *swivel* means as such, but neither is there in Feather Ride. Again, just as in Feather Ride, the opposite end of the rocker arm is not secured to the axle. However, the rocker arm is secured to the axle through universal means equivalent to the universal swivel means by the transverse pin v (Figure 5) at the center of equalizing lever h which extends between guides w projecting upwardly from the top of the axle box m.	(5) Sprin able axle viously p the front A leaf spr versal join

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Claim 11 of Knox on the Prior Art

ure 1	Jeffries Patent No. 174,533—Figure 2 (R. 474)	Pratt Patent No. 878,156 (R. 480, 481, 484)	Naeser Patent No. 1,414,147 (R. 524)	Van Leuven, Patent No. 1,655,481 (R. 547)
truck t (to iliary o the right) asso- d.	(1) Jeffries shows a railroad car truck having two axles. Either one of the axles may be regarded as a six wheel attachment for a motor vehicle, but since the front (to the left) axle in Knox is the auxiliary axle, let the front (left) axle of Jeffries be regarded as the six wheel attachment.	(1) Pratt discloses a six wheel suspension for motor vehicles. The axle and wheels intermediate the front and extreme rear wheels may be considered the six wheel attachment.	(1) Naeser shows a pair of axles and wheels thereon connected to a frame. Let the axle to the right in Figure 1 be considered as the main axle of the vehicle and the axle to the left be considered as the six wheel attachment.	(1) The vehicle as illustrated in Van Leuven. The six wheel attachment is the intermediate axle and wheels.
over	(2) There is not exactly a combined radius and rocker arm in Jeffries, but the rocker arm H, leaf spring G and hanger B provide the full function of a combined radius and rocker arm.	(2) The "rocker arms" are the levers 9. The reach 25 functions as a radius rod. These are admittedly not combined, but no inventive significance has been attached by the courts below to this feature, in Knox.	(2) Rocker arm 10 functions as a combined radius and rocker arm.	(2) Van Leuven does not have a combined radius and rocker arm, because the front spring 29, which answers to the rocker arm, is not connected directly to the auxiliary axle 41, but is connected thereto through the medium of a link designated "a furcated bracket 39" which corresponds to the yoke 15 in Knox. A radius rod is necessary only when the axle is not directly connected to the rocker arm. No inventive significance has been attached by the courts below to this feature in Knox.
nect- illus-	(3) The rocker arm H is pivotally mounted in a bracket attached to the frame, as illustrated.	(3) The rocker arms 9 are pivotally mounted on shaft 10 and also connected to the vehicle frame through the flexible spring 8.	(3) Arm 10 is pivotally connected at 9 to turned down portion of the frame 2.	(3) The bracket designated by the numeral 35 and the stud 34.
nated olt q, o the	(4) The rear end of rocker arm H is connected to spring G′ which corresponds to the vehicle spring 3 of Knox, by a pin, as illustrated.	(4) The rocker arm 9 is not connected at its end to the free ends of the vehicle spring 8, but is secured to the vehicle spring intermediate its ends by means of the U bolts. This construction is more similar to Feather Ride than it is to Knox.	(4) One end of the rocker arm is secured to the free end of the vehicle spring 5.	(4) Shackle 27 secures one end of the rocker arm (spring) 29 to the free end of the main spring 21 over the rear axle.
neans ather Ride, rm is r, the axle nt to trans- ter of s be- ardly	(5) Springs G secured to vertically slidable axle box D′ by transverse pin obviously permit angular displacement of the front axle transversely of the frame. A leaf spring is the equivalent of a universal joint (R. 112-113).	(5) The front (right) end of the rocker arm 9 is secured to the axle of the attachment by universal swivel means in the form of the interlocking clevises 18.	(5) The opposite end of the rocker arm is not secured to the axle of the attachment but neither is it in Feather Ride. Feather Ride and Naeser are identical in this respect. Universal swivel means for securing the rocker arm 10 to the attachment axle 3 is provided by slipper 11 and pivotal joint 16.	(5) This is the combination of the furcated bracket 39 and leaf spring 29. A leaf spring is the equivalent of a universal joint (R. 112-113).

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APPENDIX 4

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Appendix 4—Reading of Claim 15 of

Claim 15 of Knox, No. 1,926,727 (R. 301)	Figure 1 of Knox Disclosure (R. 296)	Feather Ride Structure—Plaintiff's Exhibit 3-A (R. 310A)	Spencer, British Patent 8262—Figure 1 (R. 564)	Jeffries, P
(1) In a motor vehicle,	(1) The part of the vehicle as illustrated.	(1) Feather Ride is a tandem axle suspension used exclusively on trailers.	(1) Spencer shows a tandem axle suspension for railway vehicles and the like.	(1) Jeffrie pension fo
(2) an axle having wheels thereon,	(2) The reference is apparently to the main axle 2 with its wheels 4.	(2) The reference is apparently to the main axle in Knox. The rear (to the right) axle constitutes the fixed or main axle of Feather Ride.	(2) Let the axle to the left in Spencer be considered as the main axle, since it is associated with the leaf spring, which is the arrangement in Knox for the main axle. The wheels are indicated in dotted line.	(2) Consid axle corres Knox. Wh
(3) a frame,	(3) Frame designated by numeral 1.	(3) The frame of the vehicle is clearly shown.	(3) The frame in Spencer is designated by the letter b.	(3) The fr in Figure
(4) springs connected to said frame having one of their ends connected by links to rocker arms,	(4) Springs 3 having their forward ends connected by shackle 9 to rocker arms 8.	(4) Coil springs are connected to said frame, as indicated, but they do not have their ends connected by links to rocker arms. The front beam corresponds to the rocker arm in Knox, and the rear beam with the coil spring may be considered to correspond to the leaf spring of Knox.	(4) Leaf springs *a* have their forward ends connected by the shackle-like device designated by Spencer as a pivoted hanging bolt q to an equalizing lever (rocker arm) h over the front axle.	(4) Spring frame and nected by
(5) means for pivotally mounting said rocker arms on said frame intermediate their ends,	(5) Reference is apparently to hanger bracket 6.	(5) The front beam bracket is a means for pivotally mounting said rocker arms (front beams) on said frame, but it is not intermediate the ends of the rocker arm, but at the fore ends of the rocker arm.	(5) Similarly to Feather Ride, there are no means for pivotally mounting said rocker arms on said frame intermediate their ends, but the rocker arm is pivotally connected to the frame at its fore end, as shown.	(5) A brac said rocker mediate the
(6) a second axle having wheels thereon,	(6) Attachment axle 10 and its wheels 5.	(6) The front axle. Its wheels are as indicated.	(6) By hypothesis, the front axle (to the right) is the second axle. Wheels are indicated in dotted line.	(6) The se (to the left)
(7) means for connecting said axle to said rocker arms, said means having means permitting said last named axle to have oscillatory movement relative to said rocker arms.	(7) The universal joint enclosed within the yoke 15 on the front end of the rocker arm and shown in detail in Figure 3; in Figures 6, 7 and 8 it is the structure shown at the left end of the rocker arm 30a.	(7) Means are provided for connecting said axle to said rocker arm (front beam). Said means, which include the rubber axle cushion surrounding the T casting, as shown in section A-A, permits said last named axle to have oscillatory movement relative to said rocker arm.	(7) The rocker arms are connected to said second axle by the transverse pin v (Figure 5) at the center of equalizing lever h which extends between guides w projecting upwardly from the top of the axle box m and which permits said last named axle to have oscillatory movement relative to said rocker arm.	(7) Leaf sp said rocker with the roc by the pin leaf spring ly slidable permits said oscillatory rocker arms. Knox's own is the equi (R. 112-113)

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of Claim 15 of Knox on the Prior Art

Figure 1	Jeffries, Patent No. 174,533—Figure 2 (R. 474)	Pratt, Patent No. 878,156 (R. 480, 481, 484)	Naeser, Patent No. 1,414,147 (R. 524)	Van Leuven, Patent No. 1,655,481 (R. 547)
ıle sus- the like.	(1) Jeffries shows a tandem axle suspension for railway vehicles.	(1) Pratt discloses a motor vehicle chassis.	(1) Naeser shows a motor vehicle chassis.	(1) Van Leuven discloses a motor vehicle.
Spencer since it , which he main dotted	(2) Consider the axle to the right as the axle corresponding to the main axle in Knox. Wheels are clearly evident.	(2) The rear axle 13 corresponds to the main axle of Knox. Wheels are designated 14.	(2) Let the axle to the right with its wheels 17 constitute the main axle of the vehicle.	(2) The rear axle (to the right) with wheels 23 corresponds to the main axle and wheels in Knox.
ignated	(3) The frame is designated by letter A in Figure 1.	(3) The frame is designated by the numeral 1.	(3) Frame is designated by the numeral 1.	(3) Frame is designated by the numeral 11.
forward like de- pivoted g lever xle.	(4) Springs G′ are connected to said frame and have one of their ends connected by a pin to rocker arms H.	(4) Springs 8 are connected to said frame, but do not have *one of their ends* connected by links to rocker arms, but, just as in the case of Feather Ride, the spring is connected intermediate its ends to the lever 9, which corresponds to the rear beam in Feather Ride.	(4) Springs 5 are connected to said frame and have one of their ends connected by links (slidable bearing blocks 7) to rocker arms 10.	(4) Springs 21 have their forward ends connected by shackle 27 to rocker arms (leaf spring) 29.
here are g said mediate pivot- ts fore	(5) A bracket for pivotally mounting said rocker arms on said frame intermediate their ends is clearly shown.	(5) Spring 8 and U-bolts connecting lever 9 to the spring constitutes *means* for pivotally mounting said rocker arms (levers 9) on said frame intermediate their ends.	(5) Just as in Feather Ride, there are no means provided for mounting the rocker arms on said frame intermediate their ends. Rather, the rocker arm 10 is pivotally connected to the frame at its front end.	(5) Bracket 35 with the stud 34 provide means for pivotally mounting said rocker arms on said frame intermediate their ends.
ıle (to eels are	(6) The second axle is the front axle (to the left). The wheels are shown.	(6) The second axle is auxiliary axle 17 with wheel 20.	(6) The second axle is the one to the front designated 3. Wheels are 17.	(6) The second axle is 41 with wheels 43.
cted to e pin v ıalizing ıides w of the id last move-	(7) Leaf spring G connects said axle to said rocker arms by the pin connection with the rocker arms and with the axle by the pin shown on the axle box. The leaf spring G together with the vertically slidable axle box D′ (see Figure 1) permits said last named axle to have oscillatory movement relative to said rocker arms. It has been established by Knox's own testimony that a leaf spring is the equivalent of a universal joint (R. 112-113).	(7) The interlocking clevises 18 connect said axle to said rocker arms, and permit said last named axle to have oscillatory movement relative to said rocker arm.	(7) Means are provided for connecting said axle 3 to said rocker arms 10. Said axle is permitted oscillatory movement relative to said rocker arms by virtue of the slidable slipper 11 and the pivotal joint 16 which permits canting of the axle in a horizontal plane as when one wheel of the axle moves horizontally to a different degree from the other wheel (lines 85-89, page 1, of the patent—R. 525).	(7) The second axle is pivotally connected to the rocker arms (leaf spring) 29 by a furcated bracket 39 and shackle bolt 38. Said last named axle is permitted to have oscillatory movement relative to said rocker arms by virtue of the flexibility of the leaf spring. It has been established by Knox's own testimony that a leaf spring is the equivalent of a universal joint (R. 112-113).

APPENDIX 5

Appendix 5—Reading of Claim 17 of

Claim 17 of Knox No. 1,926,727 (R. 302)	Figure 1 of Knox Disclosure (R. 296)	Feather Ride Structure—Plaintiff's Exhibit 3-A (R. 310A)	Spencer, British Patent 8262—Figure 1 (R. 564)	Jeffries, Pa
(1) A vehicle comprising a frame,	(1) The general structure illustrated in Figure 1 with frame designated 1.	(1) Feather Ride is a vehicle comprising a frame.	(1) The vehicle comprising a frame is clearly illustrated.	(1) The v trated.
(2) an axle,	(2) Axle 2.	(2) The axle to the right.	(2) Let the axle to the left be considered as the main axle.	(2) Consid main axle.
(3) wheels on said axle,	(3) Wheels 4.	(3) Wheels on said axle as indicated.	(3) Wheels are indicated in dotted line.	(3) Wheels trated.
(4) a spring mounted on said axle,	(4) Spring 3.	(4) The coil spring. If objection is made that the spring is not directly on the axle in Naeser, Pratt, or Jeffries, it should be noted that neither is the spring directly on the axle in Feather Ride.	(4) Spring *a*.	(4) Spring
(5) a second axle,	(5) Attachment axle 10.	(5) The axle to the left.	(5) The axle to the right is the second axle.	(5) The ax axle.
(6) a rocker arm pivoted to said frame,	(6) Rocker arm 8 is pivoted to the frame at pin 7.	(6) The front beam is a rocker arm pivoted to the frame by means of the front beam bracket, as illustrated.	(6) Rocker arm h is pivoted to the frame at its front (right) end, as illustrated.	(6) Rocker frame.
(7) means connecting said last mentioned axle and one end of said rocker arm including a universal joint	(7) The universal joint enclosed within the yoke 15 on the front end of the rocker arm and shown in detail in Figure 3; in Figures 6, 7 and 8 it is the structure shown at the left end of rocker arm 30a.	(7) There are no means connecting said last mentioned axle and *one end* of said rocker arm. Said rocker arm is connected *intermediate its ends* to the axle through the medium of the rubber cushion surrounding the T casting, as shown in section A-A (R. 310A), which provides for limited relative universal movement between the axle and the rocker arm.	(7) Said second axle is not connected with one end of said rocker arm, but neither is it in Feather Ride. Said rocker arm is connected to said second axle by means allowing for universal movement there between by the provision of the transverse pin v (Fig. 5) at the center of equalizing lever h which extends between guides w projecting upwardly from the top of the axle box m.	(7) The me axle and one the leaf sprin with rocker a virtue of its of a universa
(8) and means connecting the other end of said rocker arm with said spring.	(8) Shackle 9 which connects the other end of the rocker arm 8 with spring 3.	(8) The other end of said rocker arm is not directly connected to the spring, but is connected to the spring through the medium of the shackle and rear beam.	(8) The left end of said rocker arm is connected with the vehicle spring *a* by the shackle-like device designated by Spencer as a pivoted hanging bolt q.	(8) The othe connected wit a pin, as illus

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ng of Claim 17 of Knox on the Prior Art

–Figure 1	Jeffries, Patent No. 174,533—Figure 2 (R. 474)	Pratt, Patent No. 878,156 (R. 480, 481, 484)	Naeser Patent No. 1,414,147 (R. 524)	Van Leuven Patent No. 1,655,481 (R. 547)
s frame is	(1) The vehicle with frame, as illustrated.	(1) The vehicle with frame 1, as illustrated.	(1) Naeser shows a pair of axles and wheels thereon connected to a frame.	(1) The vehicle, with its frame, as indicated.
t be con-	(2) Consider the axle to the right as the main axle.	(2) The rear axle 13.	(2) Let the axle to the right in Figure 1 be considered as the main axle of the vehicle.	(2) The main vehicle axle is not designated by number, but is clearly evident.
otted line.	(3) Wheels on the axle are as illustrated.	(3) Wheels 14.	(3) Wheels 17.	(3) Wheels 23.
	(4) Spring G′.	(4) Spring 8.	(4) Front and rear quadrant springs 5.	(4) Springs 21.
he second	(5) The axle to the left is the second axle.	(5) Axle 17.	(5) The axle 3 is the second axle.	(5) The attachment axle 41.
d to the d, as il-	(6) Rocker arm H is pivoted to the frame.	(6) Lever 9 is a rocker arm pivotally mounted on the end of shaft 10.	(6) Rocker arm 10 at the front (left) of the vehicle is pivoted to the frame at 9.	(6) The leaf spring 29 functions as a rocker arm. It is pivoted to the frame on stud 34.
connected arm, but Said rock- cond axle sal move- ovision of t the cen- h extends upwardly m.	(7) The means connecting said second axle and one end of the rocker arm are the leaf spring G and its pin connection with rocker arm H. The leaf spring, by virtue of its flexibility, is the equivalent of a universal joint (R. 112-113).	(7) Said second axle 17 is connected to one end of the rocker arm 9 through the interlocking clevises 18, which are the full equivalent of a universal joint.	(7) There are no means connecting said second axle and *one end* of said rocker arm, just as is the case in Feather Ride. Said rocker arm *is* connected to said second axle *intermediate its ends* through the medium of a universal joint as provided by slipper 11 allowing for fore and aft movement of the axle. Up and down movement of the axle is provided by a pivotal joint 16.	(7) The means connecting axle 41 and one end of rocker arm (spring) 29 do not include a universal joint, but neither do they in Feather Ride. Limited universal movement between the axle and the frame is provided, however, by the flexibility of the leaf spring. A leaf spring is the equivalent of a universal joint (R. 112-113).
er arm is ring *a* by nated by bolt q.	(8) The other end of the rocker arm is connected with the vehicle spring G′ by a pin, as illustrated.	(8) The rocker arm is connected to the spring 8 as indicated in claim element (6), above.	(8) The other end of said rocker arm is connected to the front quadrant spring 5, which may be considered an extension of the rear quadrant spring 5, by means of sleeve member 7 and pin 8.	(8) Shackle link 27 connects the other end of said rocker arm (spring) 29 with said spring 21.